

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32903

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 627S
)	
Plaintiff-Respondent,	)	Filed: October 16, 2008
)	
v.	)	Stephen W. Kenyon, Clerk
)	
CHAD CLARKE,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
)	
	)	SUBSTITUTE OPINION
	)	THE COURT'S PRIOR OPINION
	)	DATED SEPTEMBER 2, 2008, IS
	)	HEREBY WITHDRAWN
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Cassia and Minidoka Counties. Hon. Monte B. Carlson, District Judge.

Order revoking probation and reinstating previously suspended sentences for forgery and grand theft, affirmed; judgment of conviction and sentence for grand theft, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Ann Wilkinson, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Chad Clarke appeals from the district court's order revoking probation and reinstating his previously suspended sentences for forgery and grand theft. Clarke also appeals from his judgment of conviction and sentence for a separate grand theft charge. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Clarke approached a woman and asked to mow her lawn. He then received a \$10 check in payment. Clarke altered the check to read \$70 and attempted to cash it. He was charged with

forgery. Several days later, Clarke wrongfully obtained title to, and possession of, a pickup truck without paying for it. Clarke was charged with grand theft. Clarke pled guilty to both forgery, I.C. § 18-3601, and grand theft, I.C. §§ 18-2403(1), 18-2407(1)(b), and 18-2408(2). A presentence investigation report (PSI) was completed, and Clarke was sentenced to concurrent unified terms of seven years, with minimum periods of confinement of two years. However, the district court suspended Clarke's sentences and placed him on probation.

Several months later, Clarke admitted to violating the terms of his probation. At the disposition hearing, Clarke requested and received a continuance to allow him the opportunity to obtain a psychological evaluation and to explore mental health options. At the continued disposition hearing, the parties discussed Clarke's mental health evaluation, and both parties relied on this evaluation in making their recommendations to the district court. The district court revoked Clarke's probation and imposed the original sentence but retained jurisdiction for 180 days. At the end of the period of retained jurisdiction, the North Idaho Correction Institution (NICI) issued a report recommending relinquishment of jurisdiction. After again allowing Clarke to explore mental health treatment options, the district court relinquished jurisdiction.

Clarke filed I.C.R. 35 motions, and the district court held a hearing. At the hearing, the director of a local mental health assisted living facility testified that Clarke would likely not do well in prison and that there was a bed available for him at the assisted living home. The district court granted Clarke's Rule 35 motions but did not reduce his sentences. Rather, the district court ordered an additional psychological evaluation and suspended Clarke's sentences, placing him on probation for three years and ordering him to reside in the assisted living facility.

Approximately three months later, the state filed a progress report alleging that Clarke violated the terms of his probation by being removed from the assisted living home for failing to complete his chores, abide by the curfew, and attend the Community Support Center as instructed. In addition to violating the terms of his probation by being removed from the home, it was also alleged that Clarke violated the terms of his probation by manipulating a woman into giving him the title and possession of her car without paying for it. Several weeks later the state filed a second progress report informing the district court that Clarke had been charged with grand theft in Minidoka County for stealing approximately 1800 feet of aluminum mainline pipe with an approximate value of \$3000.

Clarke admitted the probation violations and pled guilty to the grand theft charge from Minidoka County. I.C. §§ 18-2403, 18-2407. The Minidoka County grand theft charge was consolidated with Clarke's prior forgery and grand theft cases for sentencing. Clarke waived preparation of an updated PSI for the Minidoka County case. The district court revoked Clarke's probation and ordered execution of the original sentences. The district court also sentenced Clarke to a concurrent unified term of seven years, with a minimum period of confinement of three years, for the Minidoka County grand theft charge. Clarke appeals.

II.

ANALYSIS

A. Psychological Evaluation

Clarke asserts that the district court abused its discretion by failing to order a psychological evaluation pursuant to I.C. § 19-2522(1) prior to the revocation of his probation and the imposition of his sentences and, therefore, the district court manifestly disregarded I.C.R. 32. The state counters with a number of arguments, including: Clarke has failed to provide this Court with an adequate record for review; the district court was not required by either I.C.R. 32 or I.C. § 19-2522(1) to order a psychological evaluation before revoking probation; Clarke is estopped by the doctrine of invited error from challenging the district court's actions because he consented to proceeding without an updated psychological evaluation; and given all of the information before the district court, Clarke has failed to carry his burden of demonstrating that the district court manifestly disregarded the provisions of I.C.R. 32.

The determination whether to obtain a psychological evaluation lies within the sentencing court's discretion. I.C. § 19-2522(1); I.C.R. 32(d); *State v. Jones*, 132 Idaho 439, 442, 974 P.2d 85, 88 (Ct. App. 1999). The legal standards governing the court's decision whether to order a psychological evaluation and report are contained in I.C. § 19-2522. Pursuant to I.C. § 19-2522(1), if there is reason to believe that the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the sentencing court must appoint a psychiatrist or licensed psychologist to examine and report upon the defendant's mental condition.

Previous decisions indicate that, even if there is reason to believe the defendant's mental condition will be a significant factor at sentencing, the court nonetheless may deny a request for a new evaluation if the information contained in existing reports satisfies the requirements of I.C.

§ 19-2522(3). *State v. McFarland*, 125 Idaho 876, 879, 876 P.2d 158, 161 (Ct. App. 1994). Accordingly, we will uphold the district court's failure to order a psychological evaluation if the record supports a finding that there was no reason to believe a defendant's mental condition would be a significant factor at sentencing or if the information already before the court adequately meets the requirements of I.C. § 19-2522(3). *Id.* Where a defendant fails to request a psychological evaluation or object to the PSI on the ground that an evaluation has not been performed, the defendant must demonstrate that by failing to order a psychological evaluation the sentencing court manifestly disregarded the provisions of I.C.R. 32. *Jones*, 132 Idaho at 442, 974 P.2d at 88.

In January 2004, Clarke appeared before the district court for sentencing for the Cassia County cases of forgery and grand theft. The district court ordered and reviewed a PSI. The PSI provided substantial information regarding Clarke's mental health. Specifically, the PSI provided information regarding all of Clarke's prior diagnoses and the medications he was prescribed to treat those mental health issues. The PSI stated that Clarke has been evaluated a number of times by psychiatrists and psychologists in Idaho and Wyoming. The PSI contained information regarding when Clarke was first diagnosed and it listed classes that he completed as part of his rehabilitation plan as a juvenile. The PSI noted that Clarke's juvenile records were lengthy and included information regarding his behavioral and psychological problems and courses of treatment. The PSI stated that Clarke's juvenile information was on file if the district court wished to review it.

In June 2004, a report of probation violations was filed against Clarke alleging that he violated the terms of his probation by failing to attend relapse prevention classes, using marijuana, failing to maintain employment, and being arrested for petit theft. In August 2004, Clarke appeared before the district court for a probation disposition hearing. Clarke requested a continuance to allow him time to receive a mental health assessment before being sentenced on the probation violations. The district court complied with Clarke's request, stating:

Again, before I sentence and even before I listen to the State, if you wish some time to explore mental health, I'll grant you that time. I know when I sentenced him initially back in January this year the presentence report did indicate that he has some mental health issues. He has Tourette's Disorder and Bipolar Disorder and Attention Deficit Disorder and a Bipolar Personality Disorder. So he has mental health issues that I recognize, but I also recognize that

in the presentence report he's been treated for these since he was a juvenile, since he was ten years old.

Approximately one month later, the district court conducted the disposition hearing on Clarke's probation violations. The district court revoked Clarke's probation and imposed the original sentences but retained jurisdiction for 180 days. At the disposition hearing, the district court relied on a psychological evaluation of Clarke in concluding it would retain jurisdiction. In its brief on appeal, the state urged this Court to decline to address this issue because Clarke had failed to provide an adequate record by failing to include the psychological evaluation used in conjunction with the disposition hearing. However, after the state filed its brief, Clarke moved to augment the record to include the psychological report conducted for use at the disposition hearing. That psychological evaluation is entitled "Contact Sheet" and it appears in the augmented record on appeal. Thus, we will address Clarke's assertions on appeal, including the contents of the contact sheet.

At Clarke's jurisdictional review hearing in January 2005, he initially appeared before a different district court. However, based on the information contained in Clarke's PSI and testimony regarding what medications he was and was not given during his retained jurisdiction period, the district court continued Clarke's jurisdictional review hearing. The district court continued the jurisdictional review hearing primarily so that Clarke could explore options other than a prison sentence. Specifically, the district court stated:

Mr. Clarke, your behavior is not exemplary, it's not acceptable and it cannot continue. And I'm left here, sir, with few good alternatives. Your case is a difficult one in that your medical and psychological situation tells me that you're not a good risk on probation without some very specific treatment, and you're not a good candidate for the penitentiary absent some treatment. In other words, without treatment you're a lousy candidate anywhere.

So, counsel, what I'm going to do is perhaps a little unusual here, but I am going to continue the sentencing hearing.

[Defense counsel], I am going to order that you investigate possible alternatives here. And what I would like you to do specifically is contact Judge Moss in the Seventh Judicial District. There he has set up with the Department of Corrections, with prosecuting attorneys, the Department of Health and Welfare, a mental health court program which has some alternatives. I do not know if any of those alternatives are available here.

This is, however, a case that cries out for those alternatives. In fairness to both the community and to Mr. Clarke, I think we need to at least explore those.

In March 2005, Clarke appeared before the district court that handled all of his earlier appearances except his initial sentencing in January 2004 and the jurisdictional review hearing in January 2005 that was continued. Clarke testified that the mental health court from the Seventh Judicial District was not an available option. The district court concluded that Clarke was a danger to society and it relinquished jurisdiction.

In May 2005, Clarke filed I.C.R. 35 motions for reduction of his sentences. The district court held a hearing on Clarke's motions at which time Clarke presented the testimony of the director of a local mental health assisted living facility. The director testified that Clarke would not do well in prison and that the assisted living program would provide Clarke with classes, medications, counseling, and a structured living environment. The district court took Clarke's Rule 35 motions under advisement. At the end of May 2005, the district court entered an order granting Clarke's Rule 35 motions. The order provided, in part:

[T]his Court is going to grant the defendant's motion by:

1. Ordering a psychological examination at County expense;
2. Reviewing this matter upon receipt of such a psychological;
3. Ordering the defendant to remain in custody pending the psychological and pending this Court's review of it.

Counsel for the defendant is requested to schedule the psychological, requesting the examiner to address these questions:

1. Whether, with medication the defendant can live a law abiding life;
2. Whether the defendant can comply with the normal terms of probation;
3. Whether the defendant can satisfactorily live in a structured environment, such as that which is suggested.

The record contains a letter written by a social worker who conducted an interview with Clarke pursuant to his Rule 35 motions. The letter was written in June 2005 and recommends the assisted living home.¹ At the end of June 2005, the district court released Clarke from custody and again placed him on probation, this time sending him to the assisted living mental health home and ordering that Clarke abide by the rules of the home as a condition of his probation.

¹ Clarke contends that the letter by the social worker was not in compliance with the requirements of I.C. § 19-2522. We agree. However, the letter provides additional information regarding Clarke's mental health issues that the district court was able to review and consider.

In October 2005, Clarke again appeared before the district court for probation violations, which alleged that he was removed from the assisted living home for failing to complete his chores, failing to abide by the curfew, and refusing to attend the Community Support Center as instructed. In addition to violating the terms of his probation by being removed from the home, it was also alleged that Clarke violated the terms of his probation by manipulating a woman into giving him the title and possession of her car without paying for it. Additionally, it was alleged that Clarke violated his probation by being charged with grand theft in Minidoka County for stealing several thousand dollars worth of mainline pipe. Clarke admitted these probation violations.

In March 2006, Clarke appeared before the district court and entered a plea of guilty to the new charge of grand theft from Minidoka County. Clarke's counsel agreed to waive an updated PSI for that case. The district court imposed the original sentences for the Cassia County cases and sentenced Clarke to a concurrent unified term of seven years, with a minimum period of confinement of three years, for the Minidoka County grand theft case.

On appeal, the state argues that "Clarke has failed to show manifest disregard in the Cassia County cases because neither I.C.R. 32 nor I.C. § 19-2522 require a psychological evaluation for probation violation proceedings." The state also asserts that Clarke "has failed to demonstrate disregard of I.C.R. 32 in the Minidoka County case because he affirmatively waived his rights under I.C.R. 32 in that case" by waiving an updated PSI. Because we conclude that there was sufficient information before the district court to satisfy the requirements of I.C. § 19-2522(3), we need not address these alternative arguments.

The PSI provided detailed information regarding Clarke's mental health. Furthermore, we find it significant that the PSI does not recommend a psychological evaluation and, instead, refers to additional psychological information available to the district court to review. In addition to the information provided in the PSI, the district court reviewed the contact sheet--a brief psychological evaluation--at Clarke's September 2004 probation disposition hearing, the letter by the social worker, and Clarke's retained jurisdiction report from NICI. The district court dealt with Clarke from August 2004 until March 2006. The record reveals that the district court was well aware of Clarke's mental health issues and the information already before the district court adequately meets the requirements of I.C. § 19-2522(3). Therefore, we conclude the district court did not manifestly disregard the provisions of I.C.R. 32 when it revoked

probation on Clarke's Cassia County cases and imposed the sentences on those cases and the Minidoka County case without ordering additional investigative and psychological reports.

B. Revocation of Probation

Clarke argues that, given his mental health issues, the district court abused its discretion by failing to continue him on probation in his Cassia County cases and in sentencing him to imprisonment for the Minidoka County case. The state responds that Clarke was granted many concessions and opportunities to comply with the requirements of the law and that the district court finally determined a prison sentence was necessary to protect society. Therefore, the state contends that Clarke cannot demonstrate that the district court abused its discretion.

It is within the trial court's discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation a court must examine whether the probation is achieving the goal of rehabilitation and consistent with the protection of society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *Hass*, 114 Idaho at 558, 758 P.2d at 717. The court may, after a probation violation has been established, order that the suspended sentence be executed or, in the alternative, the court is authorized under Idaho Criminal Rule 35 to reduce the sentence. *Beckett*, 122 Idaho at 326, 834 P.2d at 328; *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 326, 834 P.2d at 328.

Sentencing is also a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of a sentence are well established and need not be repeated here. See *State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

When we review a sentence that is ordered into execution following a period of probation, we do not base our review upon the facts existing when the sentence was imposed.

Rather we examine all the circumstances bearing upon the decision to revoke probation and require execution of the sentence, including events that occurred between the original pronouncement of the sentence and the revocation of probation. *Adams*, 115 Idaho at 1055, 772 P.2d at 262; *State v. Grove*, 109 Idaho 372, 373, 707 P.2d 483, 484 (Ct. App. 1985); *State v. Tucker*, 103 Idaho 885, 888, 655 P.2d 92, 95 (Ct. App. 1982).

In this case, Clarke was originally granted probation for his two felonies out of Cassia County. After violating the terms of his probation, Clarke was sentenced, but the district court retained jurisdiction for 180 days. Upon completion of the retained jurisdiction period, NICI recommended relinquishing jurisdiction. However, after successful Rule 35 motions, the district court again placed Clarke on probation and he was sent to an assisted living facility. Clarke violated the terms of his probation by being removed from the assisted living home for failing to complete his chores, failing to abide by the curfew, and refusing to attend the Community Support Center as instructed; manipulating a woman into giving him the title and possession of her car without paying for it; and being charged with grand theft in Minidoka County for stealing several thousand dollars worth of mainline pipe. Clarke admitted these probation violations.

At Clarke's final probation disposition hearing, the district court stated:

In the two probation violations cases and also in the Minidoka County case this Court is going to walk itself through the mental checklist that it goes through whenever it sentences a person. The first thing I take a look at is the nature of the crimes, and here we're dealing with some serious crimes, crimes against property of people. We're dealing with forgery, grand theft, and another grand theft. These are serious crimes carrying significant prison terms and carrying significant consequences, and this Court considers those crimes to be serious.

The next thing this Court does is it takes a look at the nature of the defendant. I want the record to show this Court is well aware of the defendant's mental illness. This Court has made many concessions in the past regarding his mental illness. When this Court looks at the nature of the defendant, it seems to this Court that the only time the defendant is not committing crimes is when the defendant is incarcerated. This Court has incarcerated the defendant before. This Court has gone against the recommendation of the rider report. This Court has given the defendant an opportunity to go through certain rehabilitative or custodial places and nothing has worked.

This Court does not believe that Victory in Christ is the proper program for Mr. Clarke. This Court believes that Mr. Clarke needs to be punished. This Court believes that our society needs to be free from the criminal activity of Mr. Clarke. This Court believes that this Court will deter others from committing such crimes as forgery, grand theft, and this Court needs to deter Mr. Clarke from committing such crimes.

In this case, it is clear that probation was not achieving the goals of rehabilitation and protection of society. While on probation, Clarke violated several rules and committed misdemeanors and a new felony. The district court determined that a prison sentence was necessary to deter Clarke and others and to protect society. The district court did not abuse its discretion in revoking Clarke's probation or in sentencing him to a prison term for the Minidoka County felony.

C. Excessive Sentence

Clarke argues that, given his mental health issues, the district court abused its discretion in sentencing him to a unified sentence of seven years, with a minimum period of confinement of three years, for the Minidoka County grand theft case. The state counters that, given any reasonable view of the facts in this case, Clarke has failed to demonstrate that the district court abused its discretion.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

The above sections detail Clarke's history, record, and the many opportunities Clarke was given to avoid a prison sentence. As a juvenile, Clarke also had compiled charges of disruption of the educational process, malicious injury to property, failure to report an accident, driving

without a valid license, first degree sexual assault, possession/consumption of alcohol, tobacco violation, driving a vehicle without the owner's consent, fornication, petit theft, two charges for failure to purchase a driver's license, failure to appear, and trespassing. The sentence in this case is necessary to protect society and to deter Clarke from committing any future offenses. The district court did not abuse its discretion in sentencing Clarke to a unified term of seven years, with a minimum period of confinement of three years, for his Minidoka County grand theft charge.

III. CONCLUSION

There was sufficient information regarding Clarke's mental health before the district court to comply with the requirements of I.C. § 19-2522(3), and the district court did not manifestly disregard the provisions of I.C.R. 32. Furthermore, the district court did not abuse its discretion in revoking Clarke's probation, imposing his sentences, or sentencing Clarke to a unified term of seven years, with a minimum period of confinement of three years, for his Minidoka County grand theft charge. Therefore, the district court's order revoking probation and reinstating previously suspended sentences for forgery and grand theft is affirmed. Clarke's judgment of conviction and sentences for two counts of grand theft and one count of forgery are also affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**